

And so we shall miss him and his incisive participation, but he has lots more, many more months to go to serve on this committee. I enjoy him very much.

Senator METZENBAUM. Thank you, Alan.

Senator SIMPSON. Many questions have been asked. It can get tedious. You are all great sports at this hour, and if we go a little further tonight, you will have less to do tomorrow. And I think you would appreciate that. But you are very patient and very adroit in your responses.

Let me ask one. It came to me as I looked at a large bulk of material that our ranking member, Senator Hatch, provided us. That was a significant number of recusals. Where you recused yourself, it was quite a bulky stack. You have been recused from hearing cases more than 250 times, by count of someone on my staff, during your years on the circuit court, and that obviously is no problem and would not be a problem on the circuit court since another judge could take your place on the panel. But it seems that it could be a problem on the nine-member Supreme Court.

Will it be a problem? What do you foresee there? And I realize that is totally nebulous. Assuming your confirmation, what—I sense you will be very careful about doing that whenever you feel any sense of the conflict. In looking at some of those recusals, they were very precise, very specific; in fact, backed up carefully with documentation, letters. It was impressive, and I am not even suggesting anything that would be awry. But what do you think could happen with regard to recusals?

Judge GINSBURG. The number that you recited, in fact, startled me. I was not aware that—

Senator SIMPSON. Over the years.

Judge GINSBURG [continuing]. That there was any such number. I did recite, in response to the questionnaire, what my recusal policy is.

Senator SIMPSON. It is very clear and certainly very appropriate.

Judge GINSBURG. And the specific instances, which were not too many, in which I determined to recuse myself sua sponte, those are, I think, just 11, 11 in 13 years.

Senator SIMPSON. Eleven?

Judge GINSBURG. Yes. There are automatic recusals in my court for every judge, and that is worked out in the clerk's office. Each judge has a recusal list of clients, of parties whose cases that judge will not sit on because of a financial interest—in my case, it is never because of stock ownership, because when I got this good job we sold all our securities. Some of the judges will list one company or another, and they won't sit on those cases because they or their spouse or a minor child owns securities. That is never a cause of a conflict for me. Rather, my recusals generally occur when a lawyer in my family has a client relationship with a party. But I would have to see what is the basis for that number.

Senator SIMPSON. I am sure that what you say is so, and in most cases the clerk would automatically recuse you from her list of the parties that you had left, and I have a hunch that your list was very complete.

Judge GINSBURG. I think, Senator, now that you jog my memory, my very first year on the court, I may have had an unusual num-

ber of recusals in Federal Energy Regulatory Commission cases. I think so for this reason: My son was given at birth a share of El Paso Natural Gas, which, due to a stock split, became two shares.

When I was appointed by President Carter, we sold all of our shares, but we couldn't find my son's share of El Paso Natural Gas. It got lost in transit. A Federal statute says, if you have a financial interest, if you, your spouse, or a minor child living in your household has a financial interest in a party, a financial interest "however small"—those are the words Congress put into the statute—you must recuse yourself.

After turning over every paper we had, I finally found the El Paso share certificate, gave it to my spouse who was going to New York, and asked him to bring it to our bank and have the bank sell it. Well, he lost it en route. [Laughter.]

Then we had to—

Senator SIMPSON. It probably pleased the broker.

Judge GINSBURG. It took the better part of a year to get and sell a replacement certificate. It meant that for one entire term of the court, I was recused from all El Paso cases, not because of my husband's law practice, but simply because my son was given at birth one share then worth \$10 of El Paso Natural Gas. That experience, and others like it, might lead Congress to rethink whether the statute really should say "financial interest, however small." There should perhaps be a de minimis principle installed.

Senator LEAHY. If the Senator from Wyoming would yield, I am advised by the staff that during Judge Ginsburg's tenure on the circuit court of appeals, she was automatically recused 108 times, plus the 11 that you did. There is some confusion in the numbers.

I also tend to agree that we should probably have a different rule and put de minimis activities, because it gets a little crazy.

Senator SIMPSON. I think that is true and I concur. Obviously, some of those were the telephone companies, and I am sure your husband's firm. I am just leading it, and surely I was thinking of the broker waiting to do that transaction. You would be known as the greatest odd-lot trader of our time, one share of El Paso. [Laughter.]

Do you think that would be any problem in your duties on the U.S. Supreme Court?

Judge GINSBURG. No, Senator, I don't think so. I don't think I have the highest recusal rate on my court. On automatic recusals, I probably come out, taking 13 years into account, somewhere in the middle, I would guess.

The telephone company recusals didn't come in time to allow me to escape from the huge access charge case. I did sit on that. It was a complex case, with an opinion divided three ways among the panelists.

Senator SIMPSON. I thank you. Let me ask you a question about a case. In 1989, you were on a panel deciding *DKT Memorial Fund v. Agency for International Development*, AID. A foreign organization claimed that its speech abroad was unconstitutionally restricted by conditions the U.S. Government attached to providing financial assistance.

And while you did not reach that issue, you expressed sympathy for the argument in that sense, and so do I. Senator Simon and I

had an amendment to overturn that. Senator Bingaman and I are involved in population control at international levels. So the next question then comes back to thoughts on whether foreigners abroad have the protection of the U.S. Constitution from U.S. governmental action.

There I become triggered by activities in immigration and refugee activities. If you believe that the Constitution would apply at all to foreigners abroad, what are the limits to its protection?

I think it is my personal thought that an extension of constitutional right abroad, again, other than this issue of abortion rights or family planning or what was attempted to have been done, it would certainly have a severe effect on U.S. immigration and refugee policy. Considerable immigration activities take place in our embassies, our refugee camps, at the U.S. border, across the U.S. border, all outside of U.S. territory. Are aliens detained at the U.S. border entitled to the full panoply of constitutional rights that citizens enjoy?

Judge GINSBURG. Senator, the case law, as you know, has developed since that *DKT* (1987) decision. I think the Supreme Court has answered the question you raised. No, the Court said, the Constitution doesn't necessarily follow the flag abroad. As you correctly stated, that was a thought I expressed, but my decision did not rest on the notion that the foreign population planning group in question was entitled to U.S. constitutional rights. It was a population planning group in India. My dissent rested on the free speech rights of the U.S. organization.

Senator SIMPSON. You have always been very interested and active in population planning and that type of thing, haven't you, in your general work, issues of—of course, we know so well your work in women's rights and your significant incremental approach, which worked and worked so well. But the issue of international population planning and that type of thing is something that is appropriate.

Judge GINSBURG. Our Government has long been involved in that area. The policy that was at issue in the *DKT* case has since been changed. It was the Mexico City policy, a policy withdrawn by President Clinton in the first week of this administration.

Senator SIMPSON. Very appropriately, I thought. It was a tough one for me to watch during the administration of my own party.

As you say so clearly, you did not reach that issue, but you expressed concern and sympathy for the argument, and it is going to be a much more serious case as it comes up, as people pay more attention to refugee asylum and immigration issues.

Many of them don't understand that overseas, when someone is seeking asylum, a member of the Embassy consular staff makes the decision as to whether they receive this precious status of refugee or not, with no appeal possible under any circumstances whatsoever, and that is it. And when they get here, we have a list of items of due process that are often more than a U.S. citizen receives, an interesting irony, part of the cause of the movement in the world today here. Enough of that.

Under the ninth amendment, rights left unnamed in the Constitution are retained by the people. When considering that designation of the right retained by the people, how would you reason

the grant or denial of a new right not enumerated in the Constitution? You have touched on this.

I frankly like the way you kind of prod Congress along. It is a very important aspect of what a court should do, in my mind. Even though I believe deeply in separation of powers, there comes a time when I think a court has to say why don't you people go back to work, instead of putting me through this grueling exercise, and do what you are supposed to do, and that is correct this or legislate it. That is my view. But to what extent would the position, the action or nonaction of the Congress be a factor in your reasoning?

Judge GINSBURG. Senator Simpson, the primary guardian of the 9th and 10th amendments has really got to be the Congress itself. The national government is one of enumerated powers. To create a conflict, an arguable conflict with the 10th amendment, Congress would have to take action vis-a-vis the States.

So I think these amendments, first about not restricting people's rights and then about the reserved rights of the States, these amendments are peculiarly directed to Congress. A question about the 10th amendment would never come to Court apart from some action Congress has taken.

So I think these two amendments are instructions first and foremost to Congress itself. Congress is not to limit people's freedom and not to encroach upon the States. And it is only when Congress takes an action with regard to the States that the States consider intrusive, that a 10th amendment issue would come to the Court. So I think that these amendments are directed to the Congress. I think you suggested that in the way you put the question.

Senator SIMPSON. Justice Brennan, we used to visit about things. You can still do that I think in this separation of powers. He would often say I think it's time for you people to move. That is what he would say. And he was usually very right. I think that is a very important thing. We say it is a government of laws and not men and women, but I think it is more really a government of men and women, and not laws, and he was one who perceived that, that it was about persons. I think you perceive that, from all the readings I have looked at that you have done, the readings of your writings.

I think that is a heartening prospect, if I could enjoy seeing an opinion come down which might be just one line and say how did this get here, why didn't you do this? Was it because you were politically in chains and restricted and politically correct, where you couldn't move? This issue cries out for your attention, so have a go at it before you bring it back here.

Judge GINSBURG. Senator Simpson, I have ended a number of opinions with the lines, "We need guidance from Higher Authority."

Senator SIMPSON. You didn't mean us? [Laughter.]

Judge GINSBURG. I surely did, when we are dealing with statutes. We do have now a means of communication just starting. Brookings is aiding in this effort. There has been cooperation both on the judiciary side and on the part of Congress. Opinions of my circuit not infrequently identify statutes with gaps or obscure language. Very often, these are not political hot potatoes, but just something unforeseen, the particular case wasn't seen. We send those opinions, with no comment at all, to the Senate, and I think

the House, as well, for Congress to do what it will to clear up the laws.

Other circuits are doing this, and perhaps we will succeed in reducing some of the uncertainty in the law, if when courts spot a need for revision, clarifying revision, Congress will then respond. That kind of cooperation is just beginning and I hope it will bear fruit.

Senator SIMPSON. I hope so, too, and I think those are good things, and perhaps seminars and perhaps discussions of court members. We ought to do that through the Brookings Institution, where legislators and Supreme Court Justices sat down and talked informally, and those are good things, I think very good things.

Let me ask you another one, because it is certainly going to come up I think more and more, not just with television, violence, the arts. There has been considerable controversy in recent years over the use of Federal taxpayer money to fund art, which some find offensive. Some argue, of course, that the denial of funding of some of those art forms is equal to nothing more than censorship. Others argue that the art is sacrilegious or morally offensive and undeserving of public financial support.

The first amendment prohibits the Government from restricting expression on the basis of its content, and the courts have not made public funding or the denial of it the equivalent yet of punishing expression, and the courts have not required the Government to fund all types of art expression, and the Government is free to favor particular types of expressions over others.

What is the reasoning you might use in considering a case involving a constitutional right to Federal funding of the arts or something else that might be highly controversial of similar nature?

Judge GINSBURG. Senator Simpson, the initial concern of the first amendment is with the Government as censor. I don't think the first amendment says that the Government can't choose Shakespeare over modern theater, David Mamet, for example, in deciding what programs it wants to support, say, for public performances. It can't shut down speech, but it can purchase according to its preference, within limits.

So although the first amendment keeps the Government from squelching speech on the basis of its content, I don't think anyone has taken the first amendment or the equal protection principle to the length of saying Government must fund equally anything that anyone considers art. I think the Government as a consumer doesn't have to buy all art equally.

Senator SIMPSON. It is my experience that the toughest part of the job from this side of the table is dealing with the extremists on both sides of every issue. That is what we get to deal with here, the locked-in of the world who are not going to change their opinion, the ones who can make their opinion in the shortest possible time with the most possible emotion and the least possible content. So we deal with that continually.

Yet, those are the things that cause people great concern about their Government works, whether the courts work, and meanwhile the poor citizen who is in the middle, the thoughtful person, as I say, raising their children, going to work, coaching, teaching, in-

volving themselves in the community—they are sitting it out, and meanwhile the heavy hits and the shrieking come from both sides on both extremes, and I find that so often.

Those things, then, when they get that hot are often sidestepped by us and then they come to the judiciary. I think there will be more of that, and then they will accuse you of being an activist Court, which is the way that works. Yet, if we were more active in dealing with it before it came to the fueling of emotion and racism and guilt and anguish and all the rest of it, it might be a better filter for you. But that is rambling, as best described.

In a speech on March 9 of this year, questioning the rationale of *Roe*—and it is interesting to me how I keep reading that apparently you didn't do this correctly for some with regard to *Roe v. Wade*. I am pro-choice, always have been, never varied, after the State of Wyoming had to change its law because the law overturned by *Roe v. Wade* was exactly the same as that on the books in the State of Wyoming. I was a member of the Wyoming Legislature at the time. We did it, and it was a tough and emotional debate greater than any I have been in in this arena.

You remarked, "But without taking giant strides and thereby risking a backlash too forceful to contain, the Court, through constitutional adjudication, can reinforce or signal a green light for a social change." I would ask you, Judge Ginsburg, in your view, are the limits on the Court's ability to act as an engine for social change merely prudential and self-imposed according to the will of each Justice, or are there instead more fundamental, perhaps even constitutional, limits to the Court's authority?

Judge GINSBURG. Senator, if there is any message I would like the public to understand about courts, it is that courts don't make controversies; courts don't choose what they do. Courts are constrained, as you know, Federal courts, by article III. Article III tells Congress what it may give the Federal courts to do, and Congress is limited in this way, too. Congress can't put on our plate something that isn't included in one of the article III categories.

So the courts are limited, first, by the case or controversy requirement. A case of a judiciary nature has to be a live controversy between adverse parties. Federal courts are limited in the subject matter of the cases they may hear, and there are a host of requirements that people must meet in order to have a justiciable case or controversy. Those stem from the Constitution first, then from the laws that Congress passes in conferring or withholding jurisdiction from the Federal courts, and then from precedent built up since the Nation was new.

So no judge can decide what is appropriate for a court to do. All of what judges do is heavily constrained by the Constitution, the laws, the decisions, and the traditions that have been built up over 200 years.

Senator SIMPSON. Well, Judge Ginsburg, my time has expired, but I would just reflect that whatever you have been doing has worked pretty well, so keep doing it. That is my thought for today. Thank you, Mr. Chairman.

Senator LEAHY. Judge, you and your family have been extremely patient. I might say for myself this has been one of the most interesting and enlightening days I have spent in my 19 years here in

the Senate. I have enjoyed every moment of it, but it is time to let you and your family and your friends have some rest.

We will stand in recess until 10 tomorrow morning. Thank you.

Judge GINSBURG. Thank you.

[Whereupon, at 7:29 p.m., the committee was adjourned, to reconvene at 10 a.m., Wednesday, July 21, 1993.]